Postal Rate Commission
Submitted 8/11/2004 4:00 pm
Filing ID: 41328

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Repositionable Notes Market Test **Docket No. MC2004-5**

JOINT MOTION TO DISMISS OF THE ASSOCIATION FOR POSTAL COMMERCE, MAILING & FULFILLMENT SERVICE ASSOCIATION, AND THE DIRECT MARKETING ASSOCIATION

Pursuant to Section 21 of the rules of practice, 39 C.F.R. § 3001.21, the Association for Postal Commerce ("PostCom"), Mailing & Fulfillment Service Association ("MFSA"), and The Direct Marketing Association ("DMA") (collectively, the "Mailer Coalition"), for reasons further described below, hereby jointly move to summarily dismiss the above referenced proceeding.

The Postal Service optimistically stated in its Request for a Recommended Decision (at p. 2), that it filed its proposal with the expectation that "the rate and classification embodied in it will be attractive to the mailers and will contribute to the long-term viability of the postal system." Unfortunately, this is not the perception of the mailer membership of these three large associations of mailers. While some members of these associations do indeed desire to apply repositionable notes to their First Class and Standard Mail, and Periodicals, the Mailer Coalition is gravely concerned with the threat that the rate and classification embodied in this product poses to the fundamental legislative and regulatory principles and policies that underlie our current rate and classification system. The discussion below will establish that this proposal is unlawful on its face, and no hearing is warranted for the Commission to dismiss the request.

First, the proposal is contrary to Section 3622(b)(3) of the Postal Reorganization Act, and runs counter to the Postal Service's and this Commission's established practice, of comparatively adjusting the markups to assign institutional costs at the subclass level. As a practical matter, the proposed classification is a surcharge on certain mailpieces within the First Class, Standard Mail and Periodicals classes; a surcharge which is not based on cost. Second, the notion that the Postal Service should share in the perceived expected value of a higher response rate (above the residual effects of any such higher response, which would in many cases result in additional mailpieces) is also without statutory foundation, and unsound as a policy principle on which to establish postal rates.

I. The Proposed Rates and Classification Are Contrary to Law

The Postal Service's request is plainly inconsistent with the Act's "requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service *reasonably assignable* to such class or type."[1] For decades, the Commission has interpreted this provision as establishing a two-tier costing system comprised of both attributable and assignable costs.[2] At the base of this two-tier system is the principle underlying the first tier, that each class of mail should bear its attributable costs. The converse of this principle flows naturally: a classification is defined only where there are

---

1 39 U.S.C. § 3622(b)(3).

2 *See generally, National Association of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810 (1983) (where the Court found that this Commission's two-tier approach to allocating the Postal Service's total revenue requirement is a reasonable construction of 39 U.S.C. § 3622(b)(3).

attributable costs. Underlying the classifications approved by this Commission are both attributable and assignable costs. The Postal Service states that RPNs will not result in any increase in operational costs, and that the entirety of the revenue generated will go towards institutional costs.[3] There are no attributable costs in this case; thus there is no legal basis for a new or revised classification.

Nor is there a basis for a new rate. The Postal Service makes no showing whatsoever that institutional costs are "reasonably assigned" in this case.[4] In the 2001 rate case, the Commission already assigned institutional costs to each of the subclasses of mail to which an RPN may be applied. An institutional cost surcharge has a between rate case effect on the cost coverages, the unit contributions, and the comparative relationships among and within each of the subclasses affected; that is unreasonable and therefore contrary to 3622(b).

Moreover, the Commission should summarily reject the proposal because it simply cannot be supported under the existing legal framework. The Postal Service's proposal traverses the traditional comparative cost assignment scheme that was most recently applied in R2001-1, without offering so much as a description of the change, let alone a justification. Witness Kaneer presents the Postal Service's pricing and classification proposals for the market test. He states "in the more likely event that the associated [attributable, operational] costs are nonexistent, the entirety of the revenue generated by my proposed rates will go toward *the institutional cost burden of the*

---

[3] *Direct Testimony of Kirk Kaneer on Behalf of the United States Postal Service* (USPS-T-2) at p. 4, 8-9 (July 16, 2004).

[4] *Direct Testimony of Kirk Kaneer on Behalf of the United States Postal Service* (USPS-T-2) at p. 8-9 (July 16, 2004).

subclasses of the host piece."[5] But Witness Kaneer fails to recognize that his proposal effectively both assigns a greater institutional cost burden to certain types of mailpieces within a subclass, and shifts the cost burdens that were established on a comparative basis in Docket No. R2001-1.[6] Mailpieces to which an RPN may be affixed include a variety of products within the subclasses, products that simply cannot be characterized by content, shape, weight and processing (or any characteristics that legally define a subclass). The Postal Service offers no analysis of the implied changes in such assignments in the three subclasses of mail that are affected by the two proposed rates (½ cent for First Class Mail, 1½ cents for Standard Mail and Periodicals). Its only real justification for this adjustment to cost coverages is the perceived "value" of the RPNs, effectively writing out of existence all of the other non-cost factors of the Act, and ignoring established methods of adjusting markups which have been accepted as "fair and equitable". This is unlawful.

The Mailer Coalition recognizes that this is now merely a proposal for a provisional rate or classification, which, as a practical matter, may or may not have a significant financial effect on postal cost assignment and recovery. This surcharge, however, does have an immediate financial effect on those mailers already using RPNs.[7]

---

[5] *Direct Testimony of Kirk Kaneer on Behalf of the United States Postal Service* (USPS-T-2) at p. 8-9 (July 16, 2004) (bracketed clarification and emphasis added).

[6] *See R2001-1, Opinion and Recommended Decision Approving Stipulation and Agreement* at App. G. Sch. 3 (where the cost attribution percentages are identified).

[7] For the current mailers of RPNs, the practical impact of this proposal is simply a rate increase that contravenes the Postal Service's commitment to continue holding postage rates unchanged until at least 2006. *See* Postal Civil Service Retirement System Funding Reform Act of 2003, P.L. 108-18 (April 23, 2003), § 3(d)(1).

Thus, the illegality of the proposal cannot be ignored and must be addressed at the threshold.

II. There is no statutory basis to exploit the perceived "value" an RPN may offer in terms of a potentially increase direct mail response, and to permit this would be unsound as a matter of policy.

The Postal Service lacks a cost basis for its proposal, it therefore relies primarily on an ethereal concept of "value" to support its proposal. The principle underlying the Postal Service's proposal, that rates for First Class, Standard Mail and Periodicals should be adjusted to enable the Postal Service to share in the perceived increase in expected returns to mailers of these classes, is both contrary to law and unsound as a matter of policy.

First, the Postal Service concept of the "value" of the mail misinterprets the second factor of Section 3622(b). Section 3622(b)(2) requires that the Commission consider the "the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery." As the D.C. Circuit has explained, "What 'value,' as there used means, is the economic concept of 'value of service,' an approach which looks to demand factors, 'what the traffic will bear.'"[8] Ratemaking authorities employing a cost-based approach may integrate "value of service" in that approach to deal with the problem of price relationships in apportioning fixed costs among customers or classes of customers, as this Commission has done.[9] However,

---

8 *Association of American Publishers, Inc. et al. v. Governors of the United States Postal Service,* 485 F2d 768 (D.C. 1973).

9 *See also, Payne v. Washington Metropolitan Area Transit Commission,* 415 F.2d 901, 916 (D.C. Cir. 1968) (citing, *inter alia*, Bonbright, *Principles of Public Utility Rates,* 287 (1961)

> this approach in ratemaking contexts is anomalous since it sanctions one of the very consequences of monopoly power that public utility regulation was designed to forestall – namely the ability of the monopolist to maximize his profits by altering his prices for the same product or service according to the ability or willingness of the particular customer to pay."[10]

If applied, value-of-service principles are ancillary to, and should be applied in the context of the Commission's two-tier costing system, at the subclass level, and not as the *sole* basis on which to establish a new classification or to impose a rate increase on selected mailpieces within existing classifications.[11]

With respect to the demand factors, the Postal Service states its belief that the proposed prices will not greatly alter the economics of RPN use.[12] This suggests only that it has the power to establish or raise prices above its costs without influencing demand, and this may be merely an indication that the Postal Service is able to exploit its monopoly position.[13]

Second, as a matter of policy, in this case the Postal Service's concept of "value" is dangerous; it knows no bounds. The Postal Service proposes to share the benefits of

---

[10] *Id.*

[11] *See generally,* Bonbright, *Principles of Public Utility Rates,* 2d Ed. (Public Utilities Reports, Inc. 1988) at p. 124 *et seq.* (Chapter 6 addresses value of service as an ancillary standard and the difficulties in application of such a standard). *See also,* R77-1 *Opinion and Recommended Decision,* at p. 245-8. There the Commission recognized that a classification should have unique characteristics that warrant an independent application of all of the § 3622(b) ratemaking criteria. While the Postal Service's proposed DMCS language describes the proposed surcharges as rate categories (*Request*, *Attachment A*), they are not rate categories because they do not describe a discrete set of mail, such as presort 5-digit. The proposed surcharges would apply to mailpieces containing an RPN in all rate categories of three classes of mail. But even if the surcharges were rate categories, this Commission determines cost coverages comparatively at the subclass level. *See, e.g.,* n. 6 *supra*.

[12] *Direct Testimony of Kirk Kaneer on Behalf of the United States Postal Service* (USPS-T-2) at p. 8 (July 16, 2004).

[13] *Cf.* Kreps, David M., *A Course in Microeconomic Theory* (Princeton University Press 1990), p. 299 *et seq.* (where the author explains the standard theory of monopoly).

this mailer innovation without sharing the risks of its use. As Witness Kaneer correctly observes, the postage is only one element of the prospective costs to the mailer of affixing RPNs to its mailpieces. The costs to the mailer include the costs of the paper product, the printing, and the mechanical process used to affix the notes to the remainder of the mailpiece. The mailer therefore already takes a substantial business risk if it elects to use RPNs in a direct mail campaign. The Postal Service absorbs no such risk – and the Mailer Coalition does not argue that it should, because direct marketing is not, and should not be its business. Yet it now seeks to share in the potential return. On this theory, mailers should be entitled to a refund if the mailpiece did not perform as expected. The fact is that mailers use a variety of engagement devices to influence response rates. The Postal Service's theory in this case leads inexorably to the conclusion that it should share in the revenues derived by the mailers depending on the efficacy of the particular device employed. For example: a customized catalog should pay a higher rate than a standard catalog of the same weight and zone; personalized mailings should pay a higher rate because personalization may improve response. It is obvious that this theory is impossible to rationally apply and administer under the current statute.

Finally, acceptance of the Postal Service's proposal threatens to impose a wholly new and unknown regulatory risk on the direct mail industry – will the Postal Service attempt to extract a share of the expected returns of every future new engagement device that appears to it to be promising? Authorization of the Postal Service's proposal threatens to stifle the very mailer innovation that is so necessary at this time to promote mail volume retention and growth.

For the reasons stated above, this Commission should summarily reject the Postal Service filing and dismiss this proceeding.

Respectfully submitted,

Ian D. Volner
Rita L. Brickman
Venable LLP
575 7th Street, N.W.
Washington, DC 20004-1601
(202) 344-4800

idvolner@venable.com
rlbrickman@venable.com

Counsel to
Association for Postal Commerce
Mailing & Fulfillment Service Association

Dana T. Ackerly
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-5296
dackerly@cov.com

Counsel to
The Direct Marketing Association

August 11, 2004

DC2:\570447